Supreme Court, U.S.
FILED

981667 APR 13 1999

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No. 98 –

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

DAVID H. BARAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did withholding and estimated income tax remittances, made by the taxpayer before his income tax return was filed and before his income tax liability was ascertained by the Internal Revenue Service or himself, constitute when deemed made payments of income tax for purposes of the statute of limitations on income tax refunds (Section 6511(b)(2)(A) of the Internal Revenue Code of 1986)?

This question requires the consideration of two subsidiary questions:

1. Does Section 6513(b)(1) and (2) of the Internal Revenue Code of 1986 provide that remittances of *withholding* tax and *estimated* tax shall be deemed, or converted into, payment of *income* tax on the income tax return due date?

3. Does Section 6513(b)(1) and (2) of the Internal Revenue Code of 1986 destroy or overrule the principle of the Supreme Court's decision in *Rosenman v. United States*, 323 U.S. 658 (1945), that a tax is not paid for the purposes of the statute of limitations on refunds before the tax is known and assessed?

PARTIES TO THE PROCEEDING

All the parties are named in the caption of the case.

STATEMENT PURSUANT TO RULE 29.6

There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6.

TABLE OF CONTENTS

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF REASONS FOR GRANTING THIS PETITION 6

I. The Existing State of the Law In The United States Courts of Appeal is Chaotic 7

II. Statutory History Does Not Support the Construction by the Court Below of Code Section 6513(b)(1) and (2) 9

III. The Structure of the Code Does Not Support Treating Payments of Withholding Tax and Estimated Tax as Payments of Income Tax 12

IV. The Analysis of Code Section 6513(b) by the Court Below is Incorrect 15

V. The Statutory Construction Endorsed by the Court Below Violates Due Process 17

VI. The Claim for Credit was Timely under Section 6513(d), and the Credit Should be Available, as Claimed, for the Year 1989 18

CONCLUSION 19

TABLE OF AUTHORITIES

CASES **Page(s)**

Blatt v. United States, 34 F.3d 252 (4th Cir. 1994) 8

Cohen v. United States, 995 F.2d 205 (Fed. Cir. 1993) 8

Ewing v. United States, 914 F.2d 499 (4th Cir. 1990), cert. den., 500 U.S. 905 (1991) 8

Flora v. United States, 362 U.S. 145 (1960) 16

Fortugno v. United States, 353 F.2d 429 (3d Cir. 1965), cert. dismissed, 385 U.S. 954 (1966) 8

Gableman v. Commissioner, 86 F.3d 609 (6th Cir. 1996) 7

Heiner v. Donnan, 285 U.S. 312 (1932) 18

New York Life Ins. Co. v. United States, 118 F.3d 1553 (Fed. Cir. 1997), cert. den., 118 S.Ct., 1559 (1998) 7,8

Ott v. United States, 141 F.3d 1306 (9th Cir. 1998) 7

Plankinton v. United States, 267 F.2d 278 (7th Cir. 1959) 7

Rosenman v. United States, 323 U.S. 658 (1945) ..... passim

Thomas v. Mercantile Nat'l Bank, 204 F.2d 943 (5th Cir. 1953) 7

United States v. Miller, 315 F.2d 354 (10th Cir. 1963), cert. den., 375 U.S. 824 (1963) 7

United States v. Dubuque Packing Co., 233 F.2d 453 (8th Cir. 1956) 7

Weigand v. United States, 760 F.2d 1072 (10th Cir. 1985) 7

STATUTES

Current Tax Payment Act, Sec. 4(b) (1943) 10

Foreign Investors Tax Act, Sec. 105(f)(1) 11

Revenue Act of 1942, Sec. 322 9

Tax Reform Act of 1984, Sec. 412(a)(1) 13

26 United States Code (Internal Revenue Code of 1986)

Sec. 31(a) 13
Sec. 6201(b)(1) 14
Sec. 6213(b)(4) 17
Sec. 6315 14
Sec. 6511(b)(2) ..... passim
Sec. 6513(b)(1) ..... passim
Sec. 6513(b)(2) ..... passim

Sec. 6513(d) 18,19
Sec. 6651 14
Sec. 6654 13
Sec. 6655
Sec. 6662 14
Sec. 6663 14
Sec. 6672 14
Sec. 7422 2

28 United States Code

Sec. 1254(I) 2
Sec. 1291 2
Sec. 1346(a)(1) 2

RULES AND REGULATIONS

Rev. Proc, 63-11, 1963-1 C.B. 497 14

Rev. Proc. 84-58, 1984-2 C.B. 501 14

Rev. Rul. 76-511, 1976-2 C.B. 428. 14,15

Treas. Reg. § 301. 6315-1 17

Treas. Reg. § 301.6402-3(a)(5) 22

LEGISLATIVE MATERIALS

H.R. Rep. No. 83-1337, at 416 (1954) 11

H.R. Rep. No. 83-1622, at 587 (1954) 11

S. Rep. No. 83-1622, at 587 (1954) 11

MISCELLANEOUS

Intenal Revenue Service Statistics of Income,
Individual Income Tax Returns 1995 16

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PETITION FOR A WRIT OF CERTIORARI

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is set forth in its entirety in the Appendix hereto at A-1 to A-4. The Memorandum and Order of the United States District Court for the District of Columbia, affirmed by the Court of Appeals, is set forth in the Appendix hereto at A-5 to A-10.

JURISDICTION

The judgment of the Court of Appeals was filed on January 20, 1999. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the United States District Court was provided by 28 U.S.C. § 1346(a)(1) and 26 U.S.C. § 7422, and jurisdiction in the Court of Appeals, by 28 U.S.C.§ 1291.

STATUTES INVOLVED

26 United States Code (Internal Revenue Code of 1986) Sections 6511 and 6513(b)(1), (2) and (d) are reproduced in the Appendix hereto at A-11 to A-13.

STATEMENT OF THE CASE

This case turns on whether withheld amounts and an estimated tax payment constituted the payment of income tax when such withheld and estimated tax remittances were deemed paid to the IRS, or whether such remittances simply became creditable amounts awaiting future application to the income tax at a time when the income tax was determined or defined. If those transfers of funds to the IRS when deemed made (April 15, 1989) were payments of income tax (here overpayments), the excess over tax due is not refundable or

creditable because refund or credit is barred by the statute of limitations. The statute of limitations, however, does not apply to withholding and estimated taxes which were not, when deemed paid, payments of *income* tax computed and determined in accordance with Chapter 1 of Subtitle A of the Internal Revenue Code.

A. Statement of Facts

In the calendar year 1988, petitioner was employed, as he had been for many years, in the mailroom of *The Washington Post*. He had, before employment with *The Washington Post*, retired from service with the United States Government and he received in 1988 a pension based on that Government service. He also had dividend income and capital gains in 1988.

Withholding on petitioner's wages by *The Washington Post*, transmitted to the IRS by the *Post*, amounted to $4,104. Toward the end of 1988, when petitioner began to review his federal income tax posture, he became concerned that the withholding might be inadequate to meet his income tax obligation (yet to be computed and determined) for the year.

Petitioner prepared his own tax returns without professional aid or advice. He relied essentially on IRS instructions for the preparation of returns. He concluded that to avoid possible penalties and interest, he should remit additional funds to the IRS. Accordingly, in January 1989 he remitted $1,100 with an IRS Form 1040-ES (Estimated Tax Form). The remittance was recorded by the IRS on January 27, 1989.

On April 15, 1989, petitioner filed an Application for Automatic Extension of Time (IRS Form 4868) to file his 1988 income tax return, without making any additional remittance to the IRS. The filing of this Form extended the time to file his 1988 income tax return to August 15, 1989.

Petitioner was unable to find a copy of his 1987 federal income tax return or copies of IRS Forms 1099 (Information Returns) for 1988. He knew that he had a substantial capital loss carryover from 1987. He also knew that he had substantial capital gains and dividend income for 1988. It was necessary, in order to prepare a correct 1988 return, to determine the amount of investment income received and capital gains and the amount of the capital loss carryover. Therefore, he went to the Washington Area Office of the Internal Revenue Service and requested assistance and information for resolving the problem.

He did not receive the assistance or information sought through this request. He therefore could not complete a proper return on time. He was not particularly concerned because he believed that the amounts withheld and remitted would fully cover his income tax liability when that liability could be correctly determined.

Sometime in early 1993 he received a letter from the IRS stating that the IRS had no record of receiving his 1988 income tax return. He responded by reiterating his need for a copy of his 1987 income tax return and the 1988 data on Forms 1099, stating why the materials sought were necessary in order to prepare his 1988 return. This time the IRS provided copies of the 1987 return and the 1988 data.

On June 1, 1993 he filed his 1988 return. His tax as determined on the return was $4,029. Withholding taxes and

the estimated tax payment amounted to $5,204. The return therefore showed an overpayment of tax in the amount of $1,175, and petitioner requested on the return that this overpayment amount be treated as estimated tax for 1989. The return was audited by the IRS and determined to be completely correct sometime in the period between June 1, 1993 and December 6, 1993. The IRS, however, rejected the claim for credit on the ground that petitioner was deemed to have made his overpayment of income tax on April 15, 1989, a date more than three years and four months (the extension period) before the claim for credit (by return) was filed on June 1, 1993.

IRS records of petitioner's tax account for 1988 simply show "credits" for withholding and the estimated tax payment up to assessment of the income tax on July 19, 1993. Only upon assessment were the credits applied to the income tax.

B. Proceedings Below

The District Court below (Lamberth, J.) granted the Government's motion for summary judgment, holding that that Court lacked jurisdiction because petitioner's claim for credit, set forth in his 1988 tax return filed June 1, 1993, for overpayment of tax was out of time, *i.e.*, barred by the statute of limitations stated in Code Section 6511(b)(2)(A). The Court dismissed the complaint with prejudice. *See* Memorandum and Order, A-5. The District Court based its decision on "statutory language" (Code Section 6513(b)(1)) which, as construed by the Court, required withholding to be treated as payment of income tax on the return due date, April 15, 1989, and on "relevant case law" which caused the "estimated remittance" to be treated as payment of income tax on the return due date. The Court also accepted that the

Government had "definitively" distinguished the case of *Rosenman v. United States*, 323 U.S. 658 (1945), which otherwise would lead to a contrary result and decision.

Upon review, the Court of Appeals affirmed, holding (1) that the payments of withholding and estimated tax when deemed made were payments of income tax "as a matter of law," and (2) that the Supreme Court case of *Rosenman v. United States*, 323 U.S. 658 (1945), was irrelevant. A-3,4.

SUMMARY OF REASONS FOR GRANTING THIS PETITION

1. The United States Courts of Appeals have divided into three groups over the question of how to determine the starting date (tax payment) for the statute of limitations on overpayments and refunds of taxes. The standards of each group of courts conflict with the standards of the other groups. Yet the applicable federal tax law should apply uniformly throughout the States of the United States. Only this Court can provide a uniform standard and establish the law.

2. Cases presenting the specific issue here, or parallel issues turning on the same analysis, arise constantly.

3. Some Courts of Appeals, including the Court below, have circumscribed this Court's decision in *Rosenman v. United States*, 323 U.S. 658 (1945), obliquely and by indirection, on grounds of law which will not withstand analysis.

4. The Court of Appeals below, like some other Courts of Appeals, has plainly misinterpreted the pertinent statute here (Code Section 6513(b)) to reach an incorrect

result in this case. Misconstruction of a federal statute of broad application requires correction by the Supreme Court.

I. The Existing State Of The Law In The United States Courts Of Appeal Is Chaotic

The matter of whether a transfer of funds to the IRS when made is a payment of tax has been highly troublesome for the federal courts. The issue — sometimes stated in legal shorthand as one of "payment" of the tax or "deposit" — has been the ongoing subject of a great number of judicial decisions, which have in recent years divided the United States Circuit Courts of Appeals into three schools of analysis:

(1) Decisions, relying on the Supreme Court *Rosenman v. United States* (323 U.S. 658 (1945)) rationale which treats all funds paid as deposits until such time as tax is ascertained and assessed, at which time the statute of limitations on refunds or credits starts running. The application of the funds to the assessment gives rise to the payment or overpayment of tax at that time. *See, e.g., Thomas v. Mercantile National Bank*, 204 F.2d 943 (5th Cir. 1953); *United States v. Dubuque Packing Co.*, 233 F.2d 453 (8th Cir. 1956); *Plankinton v. United States*, 267 F.2d 278 (7th Cir. 1959); *New York Life Insurance Company v. United States*, 118 F.3d 1553 (Fed. Cir. 1997), *cert. den.*, 118 S.Ct. 1559 (April 27, 1998).

(2) Decisions which construe the funds paid as payments of tax when made, or deemed made by statute. *See, e.g., United States v. Miller*, 315 F.2d 354 (10th Cir. 1963); *cert. den.*, 375 U.S. 824 (1963); *Weigand v. United* States, 760 F.2d 1072 (10th Cir. 1985); *Gabelman v. Commissioner*, 86 F.3d 609 (6th Cir. 1996); *Ott v. United*

States, 141 F.3d 1306 (9th Cir. 1998). This is the basis of the decision in this case by the District Court and Court of Appeals.

(3) Decisions which eschew both views stated above, in favor of a "facts and circumstances" examination of the intent of taxpayer in making payments and the treatment of funds received by the Internal Revenue Service. *See, e.g., Ewing v. United States*, 914 F.2d 499 (4th Cir. 1990), *cert. den.*, 500 U.S. 905 (1991); *Cohen v. United States*, 995 F.2d 205 (Fed. Cir. 1993); *Blatt v. United States*, 34 F.3d 252 (4th Cir. 1994); *cf. Fortugno v. United States*, 353 F.2d 429 (3d Cir. 1965), *cert. dismissed*, 385 U.S. 954 (1966).

The Supreme Court declined to provide any clarification or guidance in this area when it denied the Government's request for review by writ of certiorari of the case of *New York Life Ins. Co. v. United States*, 118 F.3d 1553 (Fed. Cir. 1997), *cert. den.*, 118 S.Ct. 1559 (April 27, 1998). In that case the Court of Appeals upheld a claim of the taxpayer for recovery of a payment on the ground that the taxpayer's remittance on a deficiency, proposed by the Government but disputed by the taxpayer, was illegally held by the Government because assessment was not timely made. The case affirmed the continuing vitality of the Supreme Court decision in the *Rosenman* case, 323 U.S. 658 (1945).

As noted, the issue in these cases is usually formulated as simply one of "payment" versus "deposit." However, this dichotomy is misleading and inappropriate for the issue presented here, the characterization of withholding and estimated taxes. These coerced exactions are taxes in their own right, but not the *income* tax. Until these payments are applied to an income tax ascertained under Chapter 1 of Subtitle A of the Internal Revenue Code. they have

inherently the character of deposits and give rise only to credits against a future income tax.

The Courts below have held in this case that their decision is mandated by Code Section 6513(b)(1) and (2), which allegedly treat withholding taxes and estimated taxes as payments of *income* tax on the return due date. Some other courts have stated this view. These courts have attempted to distinguish and disregard the basic rationale of the Supreme Court case of *Rosenman v. United States*, by declaring that case to be "superseded" by statute. However, this position ignores the history of the key statutory provisions and, even more importantly, the structure of the Code, and the place therein of withholding taxes, estimated taxes, and income taxes, as well as the relationship of these taxes to each other. It also ignores the specific language of the Code section (Section 6513(b)) invoked for decision.

II. Statutory History Does Not Support the Construction by the Court Below of Code Section 6513(b)(1) and (2)

Before 1939, the internal revenue laws of the United States were stated in Revenue Acts, re-enacted with changes and revisions at two-year intervals ordinarily. In 1939 these laws were codified in more permanent form in the Internal Revenue Code of 1939 (Title 26 of the United States Code).

In 1942, the 1939 Code was amended by adding a new Section 322, which required withholding taxes on wages. Revenue Act of 1942, § 322. Subsection (e) of Section 322 deemed such taxes to be paid on the due date for filing the income tax return, then March 15 of the following year. In 1943 a further Code amendment was made requiring payments of estimated taxes and declaring presumptively that

both estimated taxes and withholding taxes were deemed to be paid "not earlier than" the income tax return due date. Current Tax Payment Act of 1943, § 4(b).

Two years later, in 1945, the United States Supreme Court decided the case of *Rosenman v. United States*, 323 U.S. 658. In that case, the taxpayers, executors of a decedent's estate, paid an amount "on account of the Federal Estate tax" on or about the due date for the estate tax return., December 25, 1934, in order to avoid penalties and interest, stating that the amount was paid under protest and duress. Some months later, on February 25, 1935, the executors filed the estate tax return. The executors filed a claim for refund of the difference between the payment and tax shown on the return as an overpayment. The claim was filed three years and three months after the taxpayers' payment. Relying on the 1939 Code provision which barred recovery of overpayments made more than three years before the filing of the claim for refund, the IRS denied the claim for refund.

On audit in the three years following the filing of the return, the IRS determined and assessed a deficiency of estate tax and collected additional monies. More than five years after the original payment by taxpayers, but some two years after assessment, executors filed a second claim for refund of part of their initial payment. This was also denied as time-barred, and the IRS was upheld by the Court of Claims.

A unanimous Supreme Court reversed the Court of Claims, holding that, until assessment of the tax, "the taxpayer did not discharge what he deemed a liability nor pay one that was asserted . . . . The tax obligation did not become defined until April 1938." (April 1938 was the time of assessment.) *Rosenman*, 323 U.S. at 662.

When the Internal Revenue Code of 1954 was enacted, Section 322(e) of the 1939 Code became Section 6513(b) of the 1954 Code. Although there is no indication that a substantive change was intended, the draftsmen of the 1954 Code substituted a flat income tax return filing date for deemed payment of withholding taxes and estimated taxes, instead of using the phrase "not earlier than."[1] They also provided that the income tax return due date for this purpose, April 15 of the following year, did not change because of an extension of time to file. Notably, there was no effort to change or overrule by legislation the basic holding in the *Rosenman* case. There is no reference to that case in the legislative history.

In 1966, Code Section 6513(b) was divided into two subparagraphs, (b)(1) and (b)(2) (and a new (b)(3) was added which has no application here). Foreign Investors Tax Act of 1966, § 105(f)(1).

The history of these statutes is significant in the following respects:

1. There was no attempt to "supersede" the *Rosenman* case.

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[1] The Senate Report accompanying the 1954 Code stated that Section 6513(b) "corresponds to existing law in that the presumptive date of the payment is the due date of the corporation or individual tax return." S. Rep. No. 83-1622, at 587 (1954); *see also* H.R. Rep. No. 83-1622, at 587 (1954); H.R. Rep. No. 83-1337, at 416 (1954) (implying that the only change was to move the "presumptive" date of payment from March 15 (pre-1954) to April 15).

2. There was no intention to eliminate the "presumptive" character of Section 6513's deemed payment on the return due date.

3. Section 6513 was an effort to synchronize the timing of payments of withholding taxes and estimated taxes, otherwise made at intervals during the taxable year, with the date on which 98% of taxpayers file their returns, *i.e.*, April 15 or the 15th day of the fourth month of the year following the taxable year. The section deals with the timing of payments of *withholding* and *estimated* taxes only. It does not undertake to revise the tax character of payments, *i.e.*, it does not convert payments of withholding tax or estimated tax into payments of *income* tax in a case where a return is not filed on the income tax return due date and the income tax is uncomputed and unknown on that date.

III. The Structure of the Code Does Not Support Treating Payments of Withholding Tax and Estimated Tax as Payments of Income Tax

The pattern of the Internal Revenue Code makes it plain that withholding taxes and estimated taxes are separate and distinct from income taxes.

The Internal Revenue Code has six Subtitles of which only one, Subtitle A, deals with income tax, although Subtitle F, dealing with Procedure and Administration, may be applicable to any tax under the Code, *e.g.*, the income tax or estate tax or excise taxes. Within Subtitle A, only Chapter 1 sets out the complicated and intricate rules for determining taxable income and the income tax, from definition of gross income to exclusions from gross income, from adjusted gross income to deductions and to taxable income, with special provisions for capital gains, mergers and acquisitions,

pension and profit-sharing plans, oil and other mineral interests, and rules for a host of other situations and transactions. *Nothing in Chapter 1, except Section 31(a) (providing a credit for withheld tax), has to do with withholding taxes or estimated taxes.*

Withholding taxes are governed by the provisions of Subtitle C, concerned with "Employment Taxes," and are dealt with in Chapter 24 thereof. Estimated taxes are governed by the rules of Subtitle F ("Procedure and Administration") and more particularly Sections 6654 and 6655 of Subchapter A of Chapter 64 dealing with "Additions to Tax, Additional Amounts, and Assessable Penalties."

Section 58 of the Internal Revenue Code of 1939 and Section 6015 of the Internal Revenue Code of 1954 required declarations of estimated tax by individual taxpayers. These sections also defined "estimated" tax as an estimate by the individual of the amount of income tax under Chapter 1, less an estimate of credits under Chapter 1. In 1984 some Code draftsman, apparently in the interest of tax simplification, decided that Section 6015 of the 1954 Code could be eliminated, and this was done. Tax Reform Act of 1984, § 412(a)(1). As a result, the present Code has no provision which *imposes* an estimated tax requirement, but it does have *penalty* provisions for failing to pay, or for underpaying, an estimated tax. I.R.C. § 6654.

The withholding tax sections impose an obligation on *employers* to withhold from compensation paid to employees and to pay to the IRS a percentage of wages determined primarily by the number of dependents claimed by the employee (but other ways of withholding are also authorized). The withholding tax provisions recognize special exemptions. Finally, the Code imposes special and

unique penalties for failure to withhold and pay over withholding "trust fund" amounts. *See, e.g.*, the 100% penalty under I.R.C. § 6672. The penalties imposed for non-compliance with the income tax law are quite different. *See, e.g.*, I.R.C. §§ 6651, 6662, and 6663. Similarly, the estimated tax penalty provisions, which specify various methods of estimating by which penalties may be avoided, are different from the income tax penalties.

Estimated tax, unlike income tax, cannot be assessed. I.R.C. § 6201(b)(1). Apparently, like a cash bond, estimated tax can only be "posted." *Cf.* Rev. Proc. 84-58, 1984-2 C.B. 501; Rev. Proc. 63-11, ¶¶ 402, 403, 1963-1 C.B. 497. This seems to have been the procedure followed in the instant case, that is, posting of credits until the return was filed (June 1993) and an assessment of income tax was entered (July 1993), *at which time* the estimated tax was applied to discharge the income tax liability.

Code Section 6315 provides that estimated tax payments are made "on account of" income tax. The Treasury Regulation interpreting this provision states that "[t]he aggregate amount of the payments of estimated tax should be entered *upon the income tax return for such taxable year as payments to be applied against the tax shown on such return.*" Treas. Reg. § 301.6315-1 (emphasis added).

In summary, withholding taxes and estimated taxes are tax regimes in their own right. While they were created to supplement the income tax, they are governed by their own unique rules and penalties. To treat them as the income tax, which is set out in Chapter 1 of Subtitle A of the Code, is an error.

IV. The Analysis of Code Section 6513(b) by the Court Below is Incorrect

Subsection (b)(1) of Section 6513 reads as follows:

> Any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31.

The "tax" deemed paid in the subsection is the "tax actually deducted and withheld at the source," that is, the *withholding* tax, not the income tax. Thus, withholding tax payments made at monthly intervals during the taxable year are brought forward to the income tax return due date in the following year. The subsection does not purport to convert the withholding tax into income tax on the return due date; that is done on the income tax return. *Cf.* Treas. Reg. § 301.6315-1 (quoted p. 14 above).

In the case of estimated taxes, subsection (b)(2) of Section 6513 provides:

> Any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without regard to any extension of time for filing such return).

The tax dealt with here is an "amount paid as *estimated* income tax" (emphasis added). The installments of estimated tax, paid during the taxable year, are combined and deemed paid on the return due date. The subsection does not provide that the cumulative estimated taxes are converted into income tax where no income tax return is filed on the due date. That metamorphosis is impossible; the income tax remains undetermined and unknown without a return. *Rosenman v. United States*, 323 U.S. 658 (1945).

What these subsections do is synchronize the payment of withholding tax and estimated tax with the defined income tax liability shown on returns filed on the due date by 98% of all individual taxpayers. Internal Revenue Statistics of Income, *Individual Income Tax Returns, 1995*, at 5, 7. They thereby permit the discharge of income tax liability *pro tanto* when that liability is reflected in the return. As the Certificate of Assessments in this case demonstrates, when no return is filed on the due date, credits remain outstanding, income tax liability is *not* discharged, and assessment is not made until the time that the return is actually filed.

Otherwise, the statutory construction endorsed by the Court below would produce very strange results, contrary to good sense. On that construction there was an overpayment of income tax in the instant case on April 15, 1989. Of course, nobody, including petitioner, knew the amount of his income tax or the amount of overpayment on that date. Petitioner needed data, which came from the IRS much later, to prepare his return. Nevertheless, the Government implies, he should have at least filed a claim for refund of the unknown overpayment. This, of course, would be an invalid claim because *Flora v. United States*, 362 U.S. 145 (1960),

requires that the tax liability (unknown on the return due date) be fully paid as a prerequisite to the claim.[2]

If payment of income tax was made on April 15, 1989, the IRS could have assessed such payment. I.R.C. § 6213(b)(4). Why did it not? The answer is obvious; the IRS could not assess an amount as income tax when neither the IRS nor anyone else knew the amount of income tax; the IRS could only post credits reflecting the receipt of withholding and estimated taxes.

V. The Statutory Construction Endorsed by the Court Below Violates Due Process

The Court of Appeals asserts that Code Section 6513(b), as construed by it, supersedes and makes irrelevant *Rosenman v. United States*. Were there any validity to this construction, it would result in a statute that violates due process because it is arbitrary, capricious, and contrary to reality and good sense. Congress cannot, by irrebuttable "deeming," cause a payment of withholding tax or estimated tax to become a payment of an undetermined and unknown income tax.

Long ago the U.S. Supreme Court held unconstitutional, as a violation of the due process clause of the Fifth Amendment, legislation which created a conclusive and irrebuttable statutory presumption that transfers by a decedent within two years of his death were made "in

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[2] We note further that under the Treasury Regulations "in the case of an overpayment of income taxes, a claim for credit or refund of such overpayment shall be made on the appropriate income tax return." Treas. Reg. § 301.6402-3(a)(1).

contemplation of death" (and therefore, were estate taxable). *Heiner v. Donnan*, 285 U.s. 312 (1932). The presumption was contrary to fact and reality. The Court observed that the statutory provision was "not taxation, but spoliation." The Court further declared that "an individual could not be stripped of his constitutional rights in order to further a more thorough enforcement of the tax against the guilty, a new and startling doctrine . . . ." *Id.* at 327.

The constitutional violation in the *Donnan* case was not greater than that accomplished by the construction of Section 6513(b) endorsed below. As the Supreme Court declared in the *Rosenman* case, by his remittance "the taxpayer did not discharge what he deemed a liability nor pay one that was asserted . . . . The tax obligation did not become defined until April 1938 [at assessment]." *Rosenman*, 323 U.S. at 662. An Act of Congress cannot convert a payment of withholding or estimated tax into a payment of income tax before the income tax has been ascertained or defined in any way by any party.

VI. The Claim for Credit was Timely under Section 6513(d), and the Credit Should be Available, as Claimed, for the Year 1989

Code Section 6513(d) reads as follows:

> OVERPAYMENT OF INCOME TAX CREDITED TO ESTIMATED TAX.— If any overpayment of income tax is, in accordance with section 6502(b), claimed as a credit against estimated tax for the succeeding taxable year, such amount shall be considered as a payment of the income tax for the succeeding taxable year (whether or not claimed as a credit in return of estimated tax for such succeeding taxable year), and no claim for credit or refund of such overpayment shall be allowed for the taxable year in which the overpayment arises.

In his tax return for 1988, petitioner claimed as a credit against estimated tax for the succeeding taxable year the overpayment reflected on the return, $1,175. Under the statutory provision quoted above, the overpayment is thereby "considered as a payment of the income tax for the succeeding taxable year," here the year 1989.

Petitioner is entitled to what he claimed on his return, a credit for the succeeding taxable year. Under the *Government's* statutory construction and Code Section 6513(d), his payment of tax was made on the due date for the 1989 return, April 15, 1990, and the payment is therefore within the three years and four months (extension on Form 4868) of the filing of his claim for credit, made on the return which was filed June 1, 1993. Code Section 6513(d) thus disposes of this case in petitioner's favor, however Section 6513(b)(1) and (2) may be interpreted.

The position set forth here under VI was presented to the Court of Appeals by court-appointed *amicus* below. It was completely omitted from consideration by the Court of Appeals in its analysis of the case.

CONCLUSION

The basic issue in this case is whether payment of withholding taxes or estimated taxes before an income tax return is filed, or before determination or assessment of the

income tax, constitutes the payment of the income tax. The answer should be plainly negative.

For the reasons set forth, petitioner respectfully asks that this petition for a writ of certiorari be granted.

Respectfully submitted,

David Baral

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202/966-9076
Pro Se

APPENDIX

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5297 September Term, 1998

David H. Baral, 96cv01690

Appellant

v.

United States of America,

Appellee

Appeal from the United States District Court for the District of Columbia

Before: EDWARDS, *Chief Judge*, SILBERMAN and SENTELLE, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record on appeal from the United States District Court for the District of Columbia, and was briefed and argued by counsel. While the issues presented occasion no need for a published opinion, they

have been accorded full consideration by the Court. *See* D.C. Cir. R. 36(b). On consideration thereof, it is

ORDERED and **ADJUDGED**, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, for the reasons set forth in the accompanying memorandum. It is

FURTHER ORDERED, by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 41(a)(1). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
FOR THE COURT:

Mark J. Langer, Clerk

David H. Baral v. U.S.A., 97-5297

MEMORANDUM

David H. Baral appeals from the judgment of the district court denying his claim for credit of an overpayment of income tax as barred by the applicable statute of limitations. For the tax year 1988, Baral's employer withheld $4,104 in income tax from his wages; Baral also remitted an additional $1,100 in estimated tax. Baral did not file his 1988 return, however, until 1993, at which time he reported an overpayment on his 1988 taxes of $1,175 and requested that that amount be refunded. The IRS denied the claim for a credit on the ground that it was barred by the statute of limitations under 26 U.S.C. § 6511(b)(2)(A) (1994), which limits the amount of credit or refund the taxpayer can receive to the amount of tax "paid" in the three years (plus the period of any extension of time for filing the return; in this case four months) preceding the filing of the claim.

Baral contends that the withheld income tax and the estimated tax remittance were not "payments" so as to fall under the limitations of § 6511(b)(2)(A) but instead were merely "deposits" against potential liability. This argument, however, is foreclosed by the plain language of the statute. Section 6513(b)(1) provides that any amount of tax withheld from wages is "deemed to have been paid" by the recipient of the income on April 15 of the following year. Similarly, § 6513(b)(2) provides that any amount paid as estimated income tax shall be "deemed to have been paid" on April 15 of the following year. That Baral may have intended the remittances to be deposits rather than payments under § 6513 is irrelevant; the statute conclusively determines that these remittances were payments as a matter of law. Baral's reliance

on *Rosenman v. United States*, 323 U.S. 658 (1945) is similarly misplaced. *Rosenman* simply has no relevance to situations, such as the case here, involving a statutorily defined payment. As such, Baral is barred from recovering anything on his claim because his taxes for 1988 had all been paid more than three years and four months before he filed his claim, and the district court correctly granted summary judgment to the government.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID H. BARAL, Plaintiff v. THE UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 96-1690

MEMORANDUM AND ORDER

This matter comes before the court on the defendant's motion for summary judgment, pursuant to Federal Rule of Civil Procedure 56. Upon consideration of the parties' submissions and the relevant law, for the reasons set forth below, the court will grant defendant's motion for summary judgment.

I.

BACKGROUND

During tax year 1988, while employed with the Washington Post, $4,104.00 was withheld from plaintiff Mr. Baral's wage earnings. Dep. at 4, l. 7; 16, l. 3. Without knowing at that time what his exact tax liability was to be for tax year 1988, Mr. Baral sent an estimated payment for an

additional $1,100.00 to the Philadelphia Service Center of the Internal Revenue Service ("IRS") along with a Form 1040-ES, in January of 1989. Interrog. at 6; Dep. at 16, 11. 6-20 and 22, 11. 10-11. Mr. Baral submitted IRS Form 4868 in April, 1989, and was granted a filing extension until August 15, 1989. Dep. at 8, 11. 12-22 and 9, 11. 1-9. This was the only Form 4868 filed by Mr. Baral for an extension. Dep. at 10, 11. 6-9.

Anticipating a significant 1987 capital loss carryover that would be applied to 1988, Mr. Baral assumed that he would ultimately be in line for a 1988 tax refund. Dep. at 15, 11. 1-9. However, unsure of whether the withholdings were going to be sufficient and without knowledge of the exact capital loss carryover amount, Mr. Baral sent the $1,100 so as to avoid penalties and interest. Dep. at 19, 11. 2-9, and 22, 11. 12-14.

Mr. Baral did not file his 1988 tax return until June, 1993. Dep. at 1, 1. 16. He attributes the untimely filing of the 1988 return to the fact that he had lost or misplaced records necessary to prepare the return. Dep. at 10, 11. 18-22, and 11, 11. 1-20. He did make some attempt to get the information, through a request for a file transfer from the Philadelphia office to the Washington, D.C. office. Dep. at 12, 11. 3-8. That request was not satisfied. Id. The necessary information was provided by the IRS in June, 1993. Pl.'s Opp. at 2.

At the time of the June, 1993 tax filing, Mr. Baral sought a credit for $1,175.00, to be applied to his 1989 return. Dep. at 6, 11. 15-21. The IRS denied the claim, noting that statute of limitations had run. Compl. at 2. The instant action is based on Mr. Baral's assertion that this statute of limitations does not apply because his $5,204.00 of remittances were "deposits," not "payments." Compl. at 2.

II.

STANDARDS OF REVIEW

Federal Rule of Civil Procedure

Summary judgment must be granted in favor of the moving party when there is no genuine issue of material fact and the moving party is entitled to such judgment as a matter of law. Fed. R. of Civ. Proc. 56. The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When this burden is met, the non-moving party is then responsible for demonstrating that there is a genuine issue for trial. Id.

Statutory Provisions

Commonly known as the Internal Revenue Code, 26 U.S.C. Section 6511 states that the limitations periods established are jurisdictional in nature and cannot be waived. In relevant part, subsection 6511(a) allows claims for credit to be filed within 3 years from time return was filed, or 2 years from time taxes were paid, whichever expires later. 26 U.S.C. Section 6511. In addition, subsection 6511(b)(2)(A) limits the amount of credit such that it will not exceed amounts paid within 3 years preceding that credit claim filing. Id.

Internal Revenue Code Section 6513 states that taxes withheld and deducted at the source during any calendar year are considered to have been paid on April 15 of the next year. 26 U.S.C. Section 6513 (b)(1). Finally, sections 6072 and 6315 indicate that estimated payments are deemed to be paid on April 15 of the following calendar year

III.

ANALYSIS

The fundamental issue before this court is whether the remittances made by the plaintiff are to be considered "deposits" or "payments" as they relate to the applicable statute of limitations. The defendant's arguments present a very persuasive basis on which to deem the remittances as payments, based on case law and statutory language. Namely, income tax withholdings and estimated tax payments are "payments" and not "deposits."

The defendant correctly anticipates Mr. Baral's use of Rosenman, in which the Supreme Court, considering an arrangement between the taxpayer and the IRS, viewed the remittance to estate taxes as a deposit. Rosenman v. United States, 323 U.S. 658, 662 (1945). However, the defendant definitively distinguishes Rosenman from the instant case by virtue of there being no agreement of any sort between Mr. Baral and the IRS. Furthermore, the defendant points to the Rosenman decision and the line of cases following it as pre-dating the aforementioned relevant subsections of 26 U.S.C. Section 6513. According to those statutory provisions, Congress clearly intended for remittances made by April 15 of a given calendar year -- $1,100 in January, 1989 -- to be considered as taxes paid and applicable to the liability for the preceding taxable year. Mr. Baral, in citing Rosenman, cannot even point to any analogous arrangement between himself and the IRS in which he indicated that he wished remittance to be held as cash bond or "deposit."

Mr. Baral also cites Ameel v. United States, 426 F.2d 1270 (6th Cir. 1970), quoting the court as follows: "In general, a tax is considered 'paid' for purposes of the running of the periods of limitations when a taxpayer files his return, accompanied by his payment." Ameel at 1272. That case involved government assessment of further estate taxes due three years after the original return was filed. A 1965 refund claim based on excessive 1963 government assessment and related to the statute of limitations was the central issue.

At the time the 1963 remittance was paid, to cover a government-computed deficiency, a Treasury Form 1962 was prepared by the IRS agent. Id. at 1271. This Advance Payment Record had two purposes. The agent could have instructed government to either (1) cash the check and hold as cash bond against repayment to taxpayer upon request and if remittance was later found to exceed tax liability; or (2) process the check and assess as payment. Id. The agent undertook the latter instruction rather than the arrangement possible under the former. The court therefore held that payment had been made effective February 7, 1963. The February 9, 1965 refund claim was found to be outside the applicable two-year statute of limitations. While not directly on point, Ameel is actually applicable to the defense's argument that his remittances are to be considered as payments effective February 7, 1963, due to lack of special arrangement with the government.

IV.

CONCLUSION

There is no genuine issue of material fact present in this case. The remittances made by Mr. Baral are to be considered

"payments" for his 1988 tax liability. The statutory language clearly commands that taxes withheld and deducted at the source in any calendar year are to be considered as payment effective April 15 of the next year. The remittances of $4,104.00 withheld by the Washington Post are therefore to be viewed at "payment" effective April 15, 1989.

Relevant case law provides ample authority for viewing the estimated remittance of $1,100.00 as "payment" rather than "deposit." Rosenman is distinguished from the instant case by virtue of an arrangement between the taxpayer and the IRS. Likewise, the Ameel court affirmed the trial court's holding of the refund claim being outside the two-year limitation window. Again, there is the absence of any arrangement that would arguably change the effective date of payment. The defendant has effectively demonstrated a lack of genuine issue of fact in this case. Therefore, this court grants the defendant's motion for summary judgment. The complaint herein is hereby DISMISSED WITH PREJUDICE.

SO ORDERED.

Royce C. Lamberth
United States District Judge

STATUTES INVOLVED

INTERNAL REVENUE CODE (26 U.S.C.)

SEC 6511. LIMITATIONS ON CREDIT OR REFUND

(a) PERIOD OF LIMITATION ON FILING CLAIM. -- Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of any overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) LIMITATION ON ALLOWANCE OF CREDITS AND REFUNDS. --

(1) Filing of Claim within Prescribed Period. No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by taxpayer within such period.

(2) Limit on Amount of Credit or Refund. --

(A) *Limit Where Clam Filed Within 3-Year period.* -- If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time

for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(B) *Limit Where Claim Not Filed Within 3-Year Period.* -- If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

* * * * *

SEC 6513. TIME RETURN DEEMED FILED AND TAX CONSIDERED PAID.

(b) PREPAID INCOME TAX. -- *For purposes of section 6511 or 6512.* --

(1) Any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under Section 31.

(2) Any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without period to any extension of time for filing such return).

* * * * *

(d) Overpayment of Income Tax Credited to Estimated Tax. -- If any overpayment of income tax is, in accordance with section 6402(b), claimed as a credit against estimated tax for the succeeding taxable year, such amount shall be considered as a payment of the income tax for the succeeding taxable year (whether or not claimed as a credit in the return of estimated tax for such succeeding taxable year), and no claim for credit or refund of such overpayment shall be allowed for the taxable year in which the overpayment arises.